U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 October 2004

BALCA Case Nos.: 2003-INA-280, 2003-INA-281
ETA Case Nos.: P2001-CA-09511256/LA, P2001-CA-09511252/LA

In the Matters of:

FLEXY FOAM,
Employer,

on behalf of

MARIA SILVIA RIVERA,
and

EDUARDO LOPEZ,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arises from two applications for labor certification[1] filed by Flexy Foam ("the Employer") for the positions of machinist and template maker. (AF 21-22).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF refers specifically to the Maria Silvia Rivera Appeal File as representative of the Appeal File in both cases. Similar applications were filed for the Aliens and the issues raised and dealt with by the CO (*ie*., NOF, FD, etc.) in the cases are identical.

File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On December 26, 2000, the Employer filed two applications for labor certification on behalf of the Aliens to fill the positions of Machinist and Template Maker. (AF 21-22). The Employer required a sixth grade education and three years of experience in the jobs offered.

The CO issued a Notice of Findings ("NOF") on February 21, 2003, proposing to deny certification based on 20 C.F.R. § 656.21(b)(6), the unlawful rejection of U.S. workers. (AF 17-20). The CO found that there were multiple qualified U.S. applicants for the position and the Employer had not rejected them solely for lawful, job-related reasons. (AF 18). The CO also noted that the job advertisement notice posted at the Employer's place of business did not contain the appropriate information. The Employer was advised to re-post the notice in accordance with 20 C.F.R. § 656.20(g)(3)(i). Finally, the CO found that the Employer had failed to recruit through the local labor union, in violation of 20 C.F.R. § 656.21(b)(4). (AF 19-20).

On April 1, 2003, the Employer filed rebuttal, stating reasons for the rejection of the U.S. applicants cited in the NOF. (AF 8-16). The Employer argued specifically that Applicant #1 was rejected because he arrived ten minutes late for the interview and that the Employer did not feel that he was reliable or responsible on the basis on his tardiness. (AF 8).[3] As to the other applicants, the Employer stated that they were not qualified for the position or had no interest in the position. (AF 9). The Employer stated that it had posted the corrected notice on the company's bulletin board and included a copy of this notice. (AF 10-11). The Employer noted that it was a nonunion employer and thus, it was not relevant to recruit through the local labor union. (AF 10).

[3] In both cases, the Employer rejected one applicant for arriving late for the interview.

The CO issued a Final Determination ("FD") denying certification on June 6, 2003. (AF 6-7). The CO found that the Employer had unlawfully rejected Applicant #1 on the basis that he was late for the interview. The CO stated that the Employer's finding that the applicant was irresponsible was subjective and vague and that he met the experience requirements for the position. The CO further noted that the fact that the Employer is a nonunion company was irrelevant to the requirement to use the local labor union in recruitment, as required by the regulations. As a result, the CO denied certification. (AF 7).

The Employer filed a request for review on July 28, 2003. The Employer stated that the "following request for review of the denial made upon this case is herein provided." (AF 1). The Employer then stated that it would comply with the CO's request to contact the local labor union for recruitment. The Employer requested that the CO "inform us of the appropriate measures to take so that this case may continue" with respect to Applicant #1.

This matter was docketed by the Board on August 19, 2003; the Employer did not file a brief in this matter.

DISCUSSION

Initially, the Employer's request for review should be dismissed because it was untimely filed. A request for review must be made in writing and mailed by certified mail to the CO within thirty-five calendar days of the date specified on the FD. 20 C.F.R. § 656.26(b)(1); *Superseal Manufacturing Co.*, 1990-INA-296 (Aug. 13, 1991). A request for review filed more than thirty-five days after the date of the issuance of the NOF is untimely and shall be dismissed. *Ana F. Pla, M.D.*, 1992-INA-415 (Mar. 18, 1994); *Kennedy Painting & Contracting, Inc.*, 1991-INA-299 (June 23, 1992). The time period for requesting review begins to run the date following the date of the FD; in this case, that date was June 7, 2003. *See* 29 C.F.R. § 18.4(a). The deadline is thirty-five calendar days

following the beginning date and does not permit an extra five days for mailing. *Delmar Family Dental Center*, 1988-INA-132 (Sept. 26, 1988) (*en banc*). Therefore, the Employer's request for review was due on July 11, 2003; the request for review was dated July 16, 2003, but was not mailed until July 23, 2003 and was received on July 28, 2003. (AF 1-5). The late filing may be overcome if the employer demonstrates excusable neglect for the failure to file a timely request for review. *Soccer Experts, Ltd.*, 1989-INA-226 (Mar. 29, 1990). The Employer has not asserted any reason for failing to file a timely request for review.

Moreover, even if the request for review was timely, the Employer failed to state any grounds for review of the denial of certification. A request for review must be in writing and clearly identify the particular grounds for review. 20 C.F.R. § 656.26(b)(1). An employer must address the CO's grounds for denial, assign error to the FD, or otherwise dispute the CO's findings. Failure to state grounds for review where no brief is filed results in dismissal of the case. *North American Printing Ink Co.*, 1988-INA-42 (Mar. 13, 1988) (*en banc*); *Bixby/Jalama Ranch*, 1988-INA-449 (Mar. 14, 1990). A general statement of disagreement with the CO's findings does not constitute specification of grounds for review. *GCG Corp.*, 1990-INA-498 (May 20, 1991).

The Employer merely stated that "the following request for review of the denial made upon this case is herein provided." The Employer did not assign error to the CO's findings, make any other statement of disagreement with the CO, or state any grounds on which the review was to be based. The Employer also failed to file a brief on appeal stating any grounds for review. The Employer further noted that it would comply with the CO's "request" to recruit using the local labor union. The Employer's offer to cure the deficiencies by re-recruitment does not equate to stating grounds for review. *See B & B Richmond Construction Corp.*, 1995-INA-442 (Jan. 28, 1997). As such, the FD denying certification shall become the final determination of the Secretary of Labor, in accordance with 20 C.F.R. §§ 656.25(g)(2)(iv) and 656.26(b)(1).

ORDER

The CO's Final Determination denying labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.